In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1332

GEORGE ZARZOUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 382 F. 2d 1015. The opinion of the court of appeals on rehearing (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1967. A petition for rehearing was denied on March 19, 1968. The petition for a writ of certiorari was filed on April 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

306-184—68

QUESTIONS PRESENTED

1. Whether the indictment was defective.

2. Whether the trial court properly received evidence showing the conduct of petitioner's accomplice to the crime.

3. Whether a lineup in which petitioner was identified was suggestive.

4. Whether the admission of hearsay evidence constituted reversible error.

5. Whether a witness properly testified that a person portrayed in a film of the robbery resembled petitioner.

6. Whether the trial court properly instructed on aiding and abetting.

7. Whether petitioner enjoyed effective assistance of counsel.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Georgia of bank robbery in violation of 18 U.S.C. 2113(a). On April 25, 1966, he was sentenced to imprisonment for fifteen years with eligibility for parole under the provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed the conviction *per curiam* (Pet. App. A) and denied a petition for a rehearing filed by new counsel (Pet. App. B).

The government's evidence showed that on October 30, 1964, at approximately 9:15 a.m., two men, later identified as petitioner (R. 39, 67, 89–90, 91) and his deceased accomplice, Charles Sazera (R. 45–46, 68–69, 83), entered the Ponce de Leon branch of the

Bank of Georgia in Atlanta. Petitioner brandished a revolver and announced a hold-up. He ordered one of the tellers, Mrs. Lewis, to fill a large paper bag with money. Petitioner then ordered the branch manager to open the vault, but did not insist when he learned that an armored truck had just left with the daily deposits. After rummaging through the remaining tellers' cages for more money, the two men fled. The branch manager observed them drive away in a light-colored Chevy II automobile (R. 31–38).

Three employees of the bank positively identified petitioner as one of the two robbers (R. 39, 67, 89–90, 91). Other evidence showed that petitioner had rented a room in Atlanta and that a person named "Charles" had paid cash for furniture delivered to petitioner on the day after the robbery (R. 95, 102, 111, 114–122). Petitioner admitted the commission of the crime to a friend (R. 142–144).

ARGUMENT

1. The indictment (R. 224) charged that petitioner was aided and abetted in the bank robbery by Charles Sazera.[1] Petitioner first raised on appeal the contention that this made the indictment fatally defective. But even though Sazera was not named as a co-defendant, the allegation showing his participation was proper, since his conduct during the commission of the crime was attributable to petitioner. See *United States* v. *Olweiss*, 138 F. 2d 798, 800 (C.A. 2), certi-

[1] Sazera was killed during the commission of another bank robbery (R. 26, 60).

orari denied, 321 U.S. 744. The indictment adequately informed petitioner of the nature of the offense.

2. It was proper for the government to show petitioner's association with Sazera who was charged as a co-participant in the crime. That Sazera paid for petitioner's furniture one day after the bank robbery was a proper circumstance for the jury to consider in corroboration of the eyewitness identification. This did not make Sazera a witness against petitioner, and there is thus no substance in the belated contention that this testimony denied petitioner his Sixth Amendment right to confrontation.[2]

3. One day after his arrest, petitioner was identified by two of the eyewitnesses at a lineup held in Birmingham, Alabama (R. 41, 49, 67–68). Petitioner's contention that the lineup was unduly suggestive and infected the in-court identification is without any factual support. Indeed, such testimony as there is relating to the lineup shows that it was conducted in a non-suggestive manner (R. 68).

4. Without objection, F.B.I. Agent Ayers testified that he examined a 1964 Chevy II automobile, abandoned less than half a mile from the bank, which had been reported to him as having been stolen and used as the getaway car (R. 138). The admission of this testimony—*i.e.*, the hearsay report that the automobile had been stolen and used as the getaway car—was not error. Two government witnesses had testified that

[2] In light of the fact that the defense, in opening statement and cross-examination, brought out the fact that Sazera had been killed in another bank robbery (R. 26, 60), petitioner's claim of prejudice is without merit.

they observed the bank robbers leave in a 1963 or 1964 Chevy II (R. 38, 76). Ayers testified to the report only to show the purpose of his examination. In any event in light of the overwhelming evidence showing petitioner's guilt—including his own admission (R. 144)—the error, if any, was harmless.

5. During the robbery, a hidden movie camera had photographed the entire sequence of events. Evidence introduced at trial to establish a proper foundation showed that the camera recorded the events exactly as they occurred (R. 41–42). A government witness, who had known petitioner since he was a child, testified without objection that one of the robbers portrayed on the film "[l]ooked a lot like George Zarzour" (R. 126).[3] This testimony was properly received as tending to corroborate other identification evidence. The cases relied upon by petitioner—*Hendrix* v. *United States*, 327 F. 2d 971 (C.A. 5); and *Alexander* v. *United States*, 354 F. 2d 59 (C.A. 5)—are not to the contrary. They hold that "resemblance" testimony alone, without more, is insufficient to send a case to the jury. Here there was overwhelming evidence identifying petitioner as one of the two robbers.

6. The trial court did not err in giving instruction on aiding and abetting. Inasmuch as the evidence showed that petitioner and another had jointly par-

[3] On cross-examination, when asked when he had observed the film, the witness, a detective with the Jefferson County Sheriff's office, replied that he had viewed it soon after a bank robbery in Birmingham (R. 126). There was no suggestion that petitioner had participated in the later robbery. Petitioner's contention that he was prejudiced by this response—elicited by defense counsel—is without merit.

ticipated in the robbery, the jury could have convicted him as an aider and abetter even though not so charged in the indictment. See *Nye & Nissen* v. *United States*, 168 F. 2d 846, 855 (C.A. 9), affirmed, 336 U.S. 613; *United States* v. *Provenzano*, 334 F. 2d 678, 691 (C.A. 3), certiorari denied, 379 U.S. 947.

7. Petitioner also contends (Pet. 16–17) that he was denied effective assistance of counsel. A reading of the record shows, however, that counsel diligently presented petitioner's case and thoroughly cross-examined every witness. The conviction resulted not from the lack of effective assistance of counsel, but from the overwhelming evidence showing petitioner's guilt. Although chief counsel left the courtroom during the government's closing argument and the court's instructions, co-counsel remained with petitioner throughout.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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